

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

RANDY BERKSHIRE,

Plaintiff,

v.

Case No. 13-11599

JOHN KLIMOWICZ, ET AL.,

HON. TERRENCE G. BERG

HON. DAVID R. GRAND

Defendants.

**OPINION AND ORDER ACCEPTING AND
ADOPTING REPORT AND RECOMMENDATION (DKT. 20)**

Plaintiff Randy Berkshire (“Plaintiff”) is a Michigan prisoner who, at all times relevant to the facts alleged in the Complaint, was confined at the Macomb Correctional Facility. This lawsuit involves allegations that Plaintiff was mistreated by prison staff following a suicide attempt on August 31, 2011. The matter is before the Court on Defendants’ motion for summary judgment (Dkt. 14).

Magistrate Judge David Grand issued a Report and Recommendation (Dkt. 20), recommending that Defendants’ motion for summary judgment be granted, except for Plaintiff’s Eighth Amendment denial of medical care claim against Defendant Klimowicz. As to that claim, Magistrate Judge Grand recommended that Defendants’ motion for summary judgment be denied without prejudice, thus permitting Defendant Klimowicz to file second motion for summary judgment as to that sole remaining claim. According to Magistrate Judge Grand, Plaintiff’s Eighth Amendment claim against Defendant Klimowicz was not clearly pled in the

Complaint, thus Defendant Klimowicz did not adequately argue for summary judgment as to the claim, and did not attach certain documents to the motion for summary judgment relevant to the summary adjudication of that claim. As such, Magistrate Judge Grand determined that it was appropriate to permit Defendant Klimowicz to file a second motion for summary judgment as to Plaintiff's Eighth Amendment claim, and to supplement the factual record.

Plaintiff filed timely objections (Dkt. 25) to Magistrate Judge Grand's Report and Recommendation, objecting only to the recommendation that Defendant Klimowicz's motion for summary judgment be denied without prejudice. Notably, Plaintiff did not object to Magistrate Judge Grand's recommendation that Defendants' motion for summary judgment be granted as to the remainder of Plaintiff's claims. The district court will make a "*de novo* determination of those portions of the report . . . to which objection is made." 28 U.S.C. § 636(b)(1). Since Plaintiff has not objected to the recommendation that Defendants' motion for summary judgment be granted as to all claims (with the exception of the Eighth Amendment claim against Defendant Klimowicz), the Court hereby adopts that recommendation and those claims are dismissed with prejudice. *See Thomas v. Arn*, 474 U.S. 140, 149-52 (1985).

As to Magistrate Judge Grand's recommendation that Defendants' motion for summary judgment be denied without prejudice as to Plaintiff's Eighth Amendment denial of medical care claim against Defendant Klimowicz, the Court finds that this recommendation is sound. Defendants were not clearly on notice that Plaintiff was

alleging such a claim in the Complaint; it was only through a very liberal reading of the Complaint that Magistrate Judge Grand found that Plaintiff brought such a claim against Defendant Klimowicz. It is not unduly prejudicial to Plaintiff to permit Defendant Klimowicz to file a second summary judgment motion, seeking dismissal of this sole remaining claim.

Accordingly, it is hereby **ORDERED** that Magistrate Judge Grand's Report and Recommendation of December 24, 2013, (Dkt. 20) is **ACCEPTED** and **ADOPTED**. It is **FURTHER ORDERED** that Defendants' motion for summary judgment (Dkt. 14) is **GRANTED** as to all claims, with the exception of Plaintiff's Eighth Amendment denial of medical care claim against Defendant Klimowicz. As to that claim, Defendants' motion for summary judgment is **DENIED WITHOUT PREJUDICE**. Defendant Klimowicz is permitted to file a second motion for summary judgment, seeking dismissal of that sole remaining claim.

SO ORDERED.

Dated: March 17, 2014

s/Terrence G. Berg
TERRENCE G. BERG
UNITED STATES DISTRICT JUDGE

Certificate of Service

I hereby certify that this Order was electronically submitted on March 17, 2014, using the CM/ECF system, which will send notification to all parties.

s/H. Monda for A. Chubb
Case Manager